IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INC., APPELLEE.

Comes Central Altagracia, Incorporated, the appellee in the above-entitled cause, by F. L. Cornwell and N. B. K. Pettingill, its counsel of record, and hereby moves this court to dismiss the appeal now pending herein or to affirm the final decree of the court below, for the following reason, to wit:

I.

Because the transcript of record transmitted from the court below contains no statement of the facts of the case in the nature of a special verdict, nor any ruling of the court below on the admission or rejection of evidence, duly certified from said court as a part thereof, nor is any error assigned therein to any ruling of the court below upon the pleadings in said cause, wherefore the said transcript of the record contains nothing which this court can consider upon said appeal or upon which this court can base a review or reversal of the final decree of the court below therein.

II.

Because, even if the document annexed to said transcript of record and entitled "Statement of Facts in the Nature of a Special Verdict" could be considered a part of said transcript, each and every of the errors assigned in said transcript to the proceedings of the court below involves and is based upon the existence of a finding of ultimate fact that a meeting of certain parties, claimed to have been held on the 20th day of October, A. D. 1906, alluded to in paragraphs IV, V, VIII, and XIV of said document so entitled as aforesaid, was actually held on said date as claimed—a claim which the court below refused to find as a fact, as will appear from a mere perusal of said paragraphs thereof numbered as aforesaid, and, in the absence of a finding of the holding of said meeting at the time stated as an ultimate fact, said errors are based upon an unfounded premise and cannot be considered.

Wherefore the said appellee moves the court for an order of dismissal or affirmance for the reasons aforesaid.

F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., *Appellants*,
vs.
CENTRAL ALTAGRACIA, INC., *Appellee*.

GENTLEMEN: Please take notice that the appellee in the above-entitled cause will, on the 22d day of March, 1909, between the hours of 12 o'clock noon and 1 o'clock p. m., or as soon thereafter as counsel can be heard, in the Supreme Court room in the City of Washington, District of Columbia, in open court, move this court to dismiss the appeal now pending herein or to affirm the final decree of the court below.

Together with this notice appellee serves upon counsel of record for the appellants a copy of said motion to be filed in said Supreme Court, which is hereby made a part hereof.

Dated at San Juan, Porto Rico, this 24th day of February, A. D. 1909.

F. L. CORNWELL,
N. B. K. PETTINGILL,
Counsel of Record for Appellee.

To Messrs. Charles Hartzell and M. Rodriguez Serra, counsel for appellants.

Service accepted of a copy of the above motion and notice at San Juan, Porto Rico, this 24th day of February, 1909.

CHAS. HARTZELL,
Of Counsel for Appellants.

BRIEF IN SUPPORT OF MOTION.

Statement.

The transcript in this case is transmitted upon an appeal taken by the defendants in the court below from a decree against them in an equity cause decided by the District Court of the United States for Porto Rico. The final hearing was had upon the pleadings and evidence, and the final decree was in favor of the complainant, now appellee, and enjoined appellants from delivering a certain number of crops of sugar cane raised or to be raised upon certain described lands during a specified period to a certain sugar factory other than the appellee in violation of a certain contract between appellants and appellee, a corporation, whose business also was the running of a sugar factory.

The record transmitted contains all the pleadings in the case, the opinion of the court upon the merits, the final decree, the petition of appeal and other proceedings perfecting the same which were completed January 11, 1908 (Transcript, pp. 44-5); but up to the point of its conclusion, by the certificate of the clerk and the seal of the court (Transcript, p. 53), there is no compliance with the provision of section 2 of the act of Congress of April 7, 1874 (18 Stats., p. 27), by the inclusion in said transcript of any findings of fact in the nature of a special verdict. There is, however, following the certificate of the clerk as to the correctness and completeness of the transcript proper, and attached to said transcript, a certified copy of a certain document, labeled as, and doubtless intended to be, findings of facts, but which is dated *June 3, 1908* (Transcript, pp. 54 to 64).

The first ground of the motion now made is based upon the proposition that the said document, so annexed to the duly certified transcript of record as aforesaid, cannot be con-

sidered as a part thereof. The remaining grounds are based upon the contingency that the court may hold that said document is properly a part of said transcript.

As nothing in this motion affects the merits of the questions attempted to be raised upon said appeal, a more detailed statement of the actual controversy in the court below seems unnecessary.

ARGUMENT.

It has been held in several decisions of this court that a motion to dismiss or affirm may properly be made upon the grounds that the appellants' proceedings have been taken merely for delay or that the questions involved are so well settled that further argument upon them would be of no avail.

Hinckley *vs.* Morton, 103 U. S., 764.
Chanute City *vs.* Trader, 132 U. S., 210.
Equit. Life Ass. Soc. *vs.* Brown, 187 U. S., 308.

And in a still more recent case a writ of error was dismissed by this court upon its own motion on the ground that the points raised thereby had been repeatedly settled in this court against the plaintiff in error and were in effect frivolous.

Kent *vs.* People of P. R., 20 U. S., —.

I.

The first ground of the motion, as above indicated, is based upon the entire want of any finding of facts in the nature of a special verdict as required by the act of April 7, 1874, regulating appeals to this court from the Supreme Courts of Territories, as the document attached to the transcript and labeled "statement of facts" was signed by the judge long after the appeal had been perfected. This court

has repeatedly held that, where no such statement is contained in the record, there is nothing which this court can re-examine; hence the appeal should be dismissed as frivolously taken or the judgment of the court below affirmed.

Gray *vs.* Howe, 108 U. S., 12.
Salina Stock Co. *vs.* Salina Creek Co., 163 U. S., 118.
Thompson *vs.* Ferry, 180 U. S., 484.

In addition to the foregoing, a long line of cases, of which Harrison *vs.* Perea (168 U. S., 323) and Haws *vs.* Victoria Ming. Co. (160 U. S., 303), and cases therein cited, are instances, hold that this court upon such appeals will, where no questions are raised as to the pleadings or evidence, confine itself purely to the question whether the judgment or decree is sufficiently supported by the facts contained in the statement provided by said statute.

It may be contended that even where there are no findings the opinion of the court when containing a statement of the facts might be used in place of the formal findings, but this court has held to the contrary.

Saltonstall *vs.* Birtwell, 150 U. S., 419.

In view of this long line of decisions, stating the law as to the method of obtaining a review in this court, we submit that failure to comply therewith should cause appeals to be regarded as frivolous within the rule laid down in Hinckley *vs.* Morton and other cases *supra*.

II.

The second ground of the motion is predicated upon the contingency that this court may consider the document annexed to the transcript to be a part thereof.

In that event we submit that those findings so clearly support the decree and are so clearly inconsistent with the

premises alleged in the assignments of error that the appeal should still be considered frivolous and unwarranted.

It has been repeatedly held that "the statement of facts required by the statute should present clearly and precisely the ultimate facts."

U. S. Trust Company *vs.* New Mexico, 183 U. S., 535.

Crowe *vs.* Trickey, 204 U. S., 228.

A perusal of the document referred to as the statement of facts (pages 54 to 64), in connection with the final decree (pages 43-44), will be sufficient to convince the court that every ultimate fact found directly supports the decree, while the various assignments of error necessarily involve the assumption that a certain meeting alluded to in paragraphs IV, V, VIII, and XIV of the "statement of facts" was actually held, as claimed by appellants, while said statement fails to support such claim, but refers in each instance to such meeting as an alleged meeting and to the evidence at its strongest as "tending to prove" certain things about the same.

This court has distinctly held that, where the necessary legal effect of the findings of fact is inconsistent with the basis of the assignments of error, the points raised by the latter cannot be considered.

Young *vs.* Amy, 171 U. S., 184.

III.

We therefore respectfully urge that either the motion to dismiss or the motion to affirm be granted.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Solicitors for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. [redacted].

CLEMENTE JAVIERRE ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INC., APPELLEE.

RESPONSE OF APPELLEE TO APPELLANTS' OBJECTIONS AS TO NOTICE ON ITS MOTION TO DISMISS OR AFFIRM.

Counsel for appellants in their brief against this motion have alleged in their paragraph III that they have not been served with a copy of our brief, as required by Rule 6 of this court. In order to avoid any question as to the proper practice in a motion of this kind, counsel for appellee decided to waive the presentation of this motion under the original notice served upon Mr. Charles Hartzell, of counsel for appellants, on the 24th day of February, 1909, as shown in the printed motion with said original notice attached, and served a new notice on the 22d day of March, 1909, upon Mr. M. Rodriguez Serra, of counsel for appellants, which was served together with a copy of the

printed motion, notice, and brief, as shown by the original, now on file with the record in this cause, a copy of said notice and acceptance of the service of same being as follows:

"IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 424.

CLEMENTE JAVIERRE ET AL., *Appellants*,

vs.

CENTRAL ALTAGRACIA, INC., *Appellee*.

GENTLEMEN: Please take notice that the appellee in the above-entitled cause will on the 12th day of April, 1909, between the hours of 12 o'clock noon and 1 o'clock P. M., or as soon thereafter as counsel can be heard, in the Supreme Court room, in the city of Washington, District of Columbia, in open court, move this court to dismiss the appeal now pending herein or to affirm the final decree of the court below.

Together with this notice appellee serves upon counsel of record for the appellants a copy of said motion, and the brief in support thereof, to be filed in said Supreme Court, which is hereby made a part hereof.

Dated at Washington, D. C., before noon, this 22d day of March, A. D. 1909.

N. B. K. PETTINGILL.
F. L. CORNWELL.

To Messrs. CHARLES HARTZELL and M. RODRIGUEZ SERRA,
Counsel for Appellants.

Service of a copy of the above-mentioned motion, original notice, brief in support thereof, and the above supplemental notice, at Washington, D. C., prior to noon, this 22d day of March, 1909.

M. RODRIGUEZ SERRA,
Of Counsel for Appellants."

This motion is therefore submitted to the court on this 12th day of April, 1909, in pursuance of said supplemental notice, copied above, and served, as therein shown, three weeks prior to said date of submission.

We therefore again respectfully submit that said motion to dismiss or affirm should be granted upon the grounds set forth in the motion as supported by the brief therewith filed.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 171.

CLEMENTE JAVIERRE, MATIAS GIL, AND FELIX RAMOS, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF JAVIERRE & GIL, ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF AND ARGUMENT OF APPELLANTS.

CHAS. HARTZELL,
MANUEL RODRIGUEZ SERRA,
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 171.

CLEMENTE JAVIERRE, MATIAS GIL, AND FELIX RAMOS, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF JAVIERRE & GIL, ET AL., APPELLANTS,

vs.

CENTRAL ALTAGRACIA, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF AND ARGUMENT OF APPELLANTS.

Statement of the Facts.

The appellee, the Central Altagracia, a corporation organized under the laws of the State of Maine, with the object and purpose of carrying on the business of manufacturing sugar from sugar-cane in the Island of Porto Rico, acquired, in the year 1905, by contract, control of a certain sugar factory already erected, and made certain improvements and additions thereto, and in said year commenced the operation of the same and the manufacture of sugar, in accordance

with the object of its incorporation. The location of the said factory was at a point about five miles north or northeast of the city of Mayaguez, Porto Rico.

That said company did not engage in the planting or raising of sugar-cane, but in the conduct of its business depended upon securing its supply of canes by purchase from planters living in that vicinity, and that from the date of the establishment of said business by said appellee, in 1905, until after the happening of the matters in controversy in this action, the said appellee conducted its said business in manner and form as hereinbefore stated.

That the appellants, Clemente Javierre, Matias Gil, and Felix Ramos, are, and for some time past have been, the members of an agricultural copartnership, engaged in the planting and raising of sugar-canes, under the firm name and style of "Javierre & Gil."

That the lands upon which the operations of the said agricultural copartnership are carried on lie at a point about five miles south from the said city of Mayaguez, and are the property of the wives of the said partners, Javierre and Gil, the said lands, however, being cultivated by the said agricultural copartners under some arrangement for that purpose, and that at the times mentioned in this controversy the said appellants, copartners, had planted and under cultivation with sugar-cane between two hundred and three hundred acres of said lands.

That for several years prior to the times of the occurrences related in this controversy, a man by the name of Swift, being, as alleged, a British subject, had been engaged as a promoter in attempting to arrange for contracts for the purchase of sugar-cane from the planters in the said neighborhood, and which would enable him, the said Swift, to secure the funds necessary for the construction and erection of a new sugar-mill in that vicinity, and which enterprise was, in the prospectuses issued by the said Swift, called by the name of "Eureka," but, as is alleged in the bill of complaint,

at paragraph 7 thereof, and is also conceded in the answer, and as was fully shown by the evidence in the case, the said Swift project wholly failed and was abandoned during the latter part of the year 1906, for the reason that the said Swift had failed to make satisfactory arrangements with such planters and parties to raise the money necessary to carry out his said project.

That in connection with the failure of the said Swift to so carry out his said project, certain of the planters who had theretofore been negotiating with the said Swift, including appellants herein, definitely ceased and positively refused absolutely to have any further business relations or connection with the alleged Swift enterprise, and cables to that effect were duly sent to the said Swift during the fall of 1906, and it was generally understood and agreed, as alleged in the pleadings herein, that the said Swift enterprise had been wholly and entirely abandoned.

That on December 10, 1906, and after the scheme of the said Swift had been so abandoned, the appellants, through Clemente Javierre, one of the partners, entered into a contract with the appellee, through its president, F. L. Cornwall, for the delivery to appellee of all sugar-canes to be raised by appellants on the premises described in said complaint for grinding, under certain terms and conditions set forth in said contract, and which is set forth in full as Exhibit "A" to the bill of complaint, and contained at folios 13 to 17 of the transcript of the record.

That the said contract was prepared by adopting the printed form regularly used by appellee in making contracts with cane-growers, and that the said printed form was followed in its entirety with the exception of the 14th paragraph or clause thereof, which clause is the one providing for the duration of the term of the contract.

That the said 14th paragraph of said contract was modified so as to read as follows:

> "The duration of this contract will be five crops, beginning with that of 1906-1907, it being under-

stood, however, that should the projected central 'Eureka' be constructed or in course of construction on the 15th of January, 1908 (1908), the party of the second part will have the right to cancel this contract, giving notice thereof to the party of the first part on October 1st, 1907, *Addition*. The party of the first part binds itself to place at Hormigueros station sufficient cars, on each working day, in order that the party of the second part may load about one hundred tons of cane daily, save cases of force majeur (fuerza mayor)."

Prior to the execution of said contract and on October 20, 1906, a meeting of sugar planters living in the vicinity of the lands occupied by appellants was held, at which meeting the appellants were represented by Clemente Javierre, and at which said meeting the failure of the said Swift enterprise was discussed, and the necessity for the establishment of a mill for grinding the cane of such parties was likewise talked about and taken into consideration, and as a result there was then and there adopted and signed by the parties present, including the said appellants, copartners, the following memorandum of agreement, to wit:

"Having met at Hacienda Dos Hermanos on the 20th of October, 1906, upon invitation from Don Antonio R. Cabasa y Tasara to confer about the installation of central Eureka in view of the delay, and it being almost sure that Mr. A. E. H. Swift, with whom Mr. Cabasa had a contract for installing said central, has not been able to accomplish it, a meeting was held by Messrs. Clemente Javierre for Javierre and Gil, Mateo Fajardo, Luis Fajardo and Mr. Cabasa, who, having heard the reasons set forth by Mr. Cabasa, all agreed as to the necessity of installing said central, and in order to accomplish such beneficial and necessary project they all agreed to carry same into effect, purchasing the establishments and the surrounding lands from Messrs. Fajardo for the erection thereon of said Central Eureka, under the following conditions:

"1. To organize a company for that purpose as soon as Messrs. Matias Gil and D. L. Thompson would arrive, they being absent.

"2. The corporation to be denominated 'Central Eureka' and the factory to be installed in the establishment of Messrs. Fajardo, hereinbefore mentioned, which shall be purchased at the price agreed upon by the incorporators.

"3. The incorporators bind themselves to sell their canes to this central during ten years, commencing from the one of 1908, as regards Javierre and Gil, Cabasa and Luis Fajardo, and after the expiration or cancellation of his contract with Guanica Central as to Mr. Mateo Fajardo.

"And for safety and record for all concerned a copy is issued to each of the interested parties who sign below.

"(Signed) CLEMENTE JAVIERRE.
"A. R. CABASA.
"M. FAJARDO.
"L. FAJARDO."

That said memorandum of agreement provided for the reconstruction and erection of a sugar mill, to be known by the name of "Eureka," and that there should be incorporated a company for the purpose of carrying out the general plan of the reconstruction and operation of the said mill, and it was likewise provided, as appears thereby, that all of the sugar-canes which should be raised by the parties joining in the said enterprise, for the period of ten years from said time, should be sold to and ground at the said mill proposed to be so reconstructed and erected under said agreement. (See transcript of record, folios 86, 87.)

That in pursuance of the said agreement an engineer named Thompson, under date of November 29, 1906, prepared and submitted certain estimates for the reconstruction of the said mill mentioned in the said memorandum of agreement dated October 20 and in accordance therewith, but, as appears, no active steps were taken for the erection and reconstruction of the said mill so contemplated by said

planters' agreement for some months, except that the said engineer Thompson continued seeking options on new and second-hand machinery and in preparing estimates in connection with said work; and that another of the said planters, Mateo Fajardo, who was likewise a party to said agreement of October 20, was active in negotiating for a loan to pay his proportion of the cost of said proposed new factory. (Transcript of record, folio 88.)

That in May, 1907, appellants and others did incorporate a company under the name of "Central Eureka, Incorporated," and proceeded with the construction of a mill known as "Central Eureka," expending in and about the same large sums of money, and that at the time of the trial of the action in question it appears that the same had been practically completed.

That the said appellants, Javierre and Gil, were officers and large stockholders in the said enterprise, participating in all steps in the carrying out thereof. (Transcript of record, folio 89.)

On October 1, 1907, in accordance with the provisions of said clause 14 of said grinding contract, as amended and as heretofore set forth, appellants did serve on appellee the notice of its intention to cancel the said grinding contract, claiming that the projected Central Eureka was then being constructed under the terms of said contract. (Transcript of record, folio 97.)

This present action is a bill in equity, filed by appellee, seeking to enjoin appellants from selling or delivering their sugar-canes to be raised by them for the period of ten years to the said Central Eureka, which was then being erected by appellants and others in pursuance of the plan originating at the meeting of planters held on October 20, as hereinbefore referred to.

The said bill of complaint was filed on June 21, 1907, more than three months prior to the time when the said appellants might seek to take advantage of the provisions of

the said XIV paragraph of said cane-grinding contract of December 10, 1906, and the said action is based on the claim that the words "Projected Central Eureka," as used in paragraph XIV of the said grinding contract, as said paragraph was amended, referred to, and was known and understood to refer exclusively to what was known as the "Swift Eureka Project," and had no reference whatever to the Eureka mill, which appellants claim was originated at the planters' meeting of October 20, 1906, and in and by paragraph XII of the said bill of complaint, set forth at folios 7 and 8 of the transcript of the record, it is charged that the appellants, in combination and conspiracy with certain other parties therein named, and subsequent to the time of the making of the contract of December 10, 1906, had originated and incorporated the alleged Central Eureka, and said paragraph and others following charge that the conspiracy and combination in question was for the purpose of enabling appellants to claim that the said Central Eureka, which they were then constructing, was the identical mill referred to in said paragraph XIV of said contract, whereas complainant claims in said bill of complaint that the projected Central Eureka therein referred to was the so-called "Swift Enterprise" and none other.

In the answer filed by the defendant copartnership, appellants herein, it is fully denied that the Central Eureka referred to in and by the said fourteenth clause of said contract of December 10, 1906, was the Swift enterprise, and it is set forth that it was well known prior to the date of the said grinding contract that the said Swift project for a Central Eureka had been wholly abandoned, and it is alleged that the projected Central Eureka referred to in said contract was that which originated at the meeting of October 20, 1906, and which central was afterwards actually constructed.

The controversy then largely centers itself to the single proposition as to the identity of the projected Central Eureka referred to in the said paragraph XIV of the said contract

of December 10, 1906, and as to the question of the burden of proving the identity of such central.

The other defendant named in the bill of complaint, El Banco Territórial, was dismissed therefrom.

Assignments of Error and Points Relied Upon in the Argument.

1. (*a*) The error of the court in directing the issuance of an injunction in this case and holding that the contract for grinding of December 10, 1906, should be in force and effect for the period of five years, and,

(*b*) Error of the court in rendering and entering a decree in favor of appellee and against appellants, and in the issuance of any injunction in the premises.

2. Error of the court in holding that the relief granted in the action should be in the nature of injunction, whereas the only relief to which complainant could be entitled must be in the nature of specific performance.

3. Error of the court in holding that appellants, defendants below, must prove by a preponderance of the testimony that the projected Central Eureka referred to in clause fourteen of the grinding contract of December 10, 1906, was not the project known as the Swift enterprise.

4. Error of the court in holding that appellants had not proven that the proposed Central Eureka referred to in the fourteenth clause of said grinding contract was the Central Eureka which originated at the meeting of October 20, 1906, and which was subsequently constructed.

5. Error of the court in holding that the burden of proof in the case as to the identity of the Central Eureka referred to in said fourteenth clause of said grinding contract rested upon appellants, defendants below, and that said defendants

must establish their defense by a preponderance of the testimony.

6. The contract of December 10, 1906, for grinding cane is wholly unilateral, unjust and unconscionable in its terms as against appellants, defendants below, and therefore the same is incapable of being enforced by a court of equity, either affirmatively by way of specific performance, or negatively by way of injunction, and that the same is entirely without equity.

BRIEF AND ARGUMENT.

In presenting to the court our argument to sustain the appeal in this case, we are met at the outset by the fact that appellee has filed herein a motion to dismiss the same on the ground and for reasons which do not appear to be clear, or, at least, the consideration of which would seem to involve an examination and determination of the points raised upon our appeal.

It is, of course, conceded that if an inspection of the record on appeal should disclose that the same has been taken for the purpose merely of delay that the court will at once dismiss or affirm the decree of the lower court, and also that if it should appear, upon an inspection of the record, that the sape was frivolous that the same effect would follow, but as to what manner counsel can hope to apply any such doctrine to the appeal in this case we are compelled to confess our entire ignorance.

Counsel contend that the transcript of record does not contain a finding of fact in the nature of a special verdict, as required by the act of April 7, 1874, and seek to reject the statement of facts which is actually contained in the record for several reasons which would appear to be without merit.

We contend that this statement of facts set forth at folios 83 to 99 of the transcript of the record not only appears to

be in entire conformity with the requirements of the act of Congress referred to, but it is recited therein, in the last paragraph thereof, at folio 99 of the transcript, that the same is settled and signed to the satisfaction of the respective counsel and court, as the statement of facts in the nature of a special verdict, and we shall assume that the said statement of fact is at least in substantial compliance, and, in fact, we contend an absolute and full compliance with the requirements of said act of Congress, and upon the same, together with the balance of the record, we shall take the liberty of presenting our arguments.

Counsel likewise ask to dismiss the appeal upon the ground that the statement of facts as set forth in the record fully supports the decree of the court below, but as this assumption involves a discussion and consideration of the points raised by the appeal we shall present those points, secure in the belief that the court will investigate the merits of the matters presented, to the end that justice shall be done.

Points of Argument.

1. THE COURT ERRED IN HOLDING THAT THE CONTRACT FOR GRINDING OF OCTOBER 10, 1906, SHOULD BE ENFORCED FOR A PERIOD OF FIVE YEARS, AND IN DIRECTING THAT THE INJUNCTION SHOULD BE ISSUED ENJOINING APPELLANTS FROM SELLING THEIR CROPS DURING THAT TIME TO THE CENTRAL EUREKA.

This specification covers several of the assignments of error set forth, and enables us to present to the court a short review of the facts as we contend they are shown by the pleadings, opinion of the court and statement of the facts in the nature of a special verdict.

We well appreciate the rulings of this honorable court, which have been many times affirmed, to the effect that on appeals from territorial courts, in which undoubtedly this

Porto Rican appeal would be classified, the court in its review is limited in its jurisdiction to the ascertaining as to whether or not the findings and record as presented support the judgment of the court. See—

Neslin *vs.* Wells Fargo Company, 104 U. S., 428.
Harrick *vs.* Hannaman, 168 U. S., 328.
Naeglin *vs.* De Cordova, 171 U. S., 638.
Apache County *vs.* Barth, 177 U. S., 538.
Haws *vs.* Victoria Copper Co., 160 U. S., 303.

But it is well settled likewise that when a case is properly appealed to this court the court will go beyond the question upon which the jurisdiction of the appeal itself is based, and will dispose of the entire controversy, including all questions, whether of jurisdiction or on the merits.

Chappell *vs.* United States, 16 U. S., 499.
Homer *vs.* United States, 143 U. S., 570.
Santa Clara County *vs.* The Southern Pac. Railroad Co., 118 U. S., 394.

And in connection with this assignment of error and our review of the facts, as we contend they are established by the record, including the findings of the court, we shall maintain and contend that the decision of the court is not in anywise supported, either by the pleadings or the findings of the court, and that, therefore, even with the extremely restricted jurisdiction which prevails under the ruling of the court with reference to review on appeal from territorial courts, that this case should be reversed for the reasons so urged.

Certain fundamental facts are established by the pleadings.

That appellee was engaged in the operation of a sugar central in purchasing sugar-cane to be ground therein.

That appellants were engaged in raising sugar-cane on the premises described in the bill of complaint at a point about ten miles from the mill of appellee, and that on December

10, 1906, the grinding contract, made Exhibit "A" to the bill of complaint, was executed.

That one Swift had for several years prior to said time been attempting to negotiate contracts with planters and to secure the funds necessary to erect a mill to be known as "Eureka" in the said vicinity, but that in the latter part of the year 1906 the said Swift enterprise wholly failed and had been abandoned.

This fact of the failure and abandonment of the Swift enterprise prior to the execution of the grinding contract of December 10, 1906, is most important, as will develop, and on the face of the pleadings it is fully conceded and established.

Paragraph VII of the bill of complaint says:

> "That during the latter part of the year of our Lord one thousand nine hundred and six, the said proposed central, which was in all of the prospectuses of the said Swift called by the name of Central 'Eureka,' and was so designated in his correspondence with prospective colonos, etc., failed, for the reason that the said Swift failed to make satisfactory arrangement with his prospective colonos and failed to raise the necessary financial means to carry out his project."

And in paragraph XII of the bill of complaint, as follows:

> "Your orator further alleges unto your honor that Mateo and Luis Fajardo are the owners of a mill that is now abandoned and called 'San José,' situate near the station of Hormigueros, along the line of the American Railroad Company of Porto Rico, and that after the hereinbefore scheme of said Swift had wholly failed, and after the said Javierre and Gil had entered into the contract," etc.

And the final failure and cancellation of the Swift enterprise, as fully set forth and affirmed in paragraph VII of

the answer of appellants, being folio 29 of the transcript of the record, as follows:

> "And for answer to the seventh paragraph of the said bill of complaint, these defendants allege that they admit that during the years 1904 and 1905, and during a part of 1906, a certain person named Swift was negotiating for the erection of a sugar factory on one of the properties controlled by these defendants, or elsewhere in the vicinity, and they admit that in the latter part of the year 1906 and the negotiations of the said Swift and between the said Swift and the cane-planters in said District, with whom he was negotiating, including these defendants, failed and were definitely cancelled and abandoned. They admit that the said Swift wholly failed to make any satisfactory arrangements with the cane-planters of said District with whom he was negotiating, and failed to raise the necessary financial means to carry out the said project; and these defendants allege that in the month of September, 1906, the said Swift having wholly failed as aforesaid in his negotiations aforesaid for the establishment of the proposed sugar-mill to be erected by him, that all negotiations between the said sugar-cane planters, including these defendants and the said Swift, were definitely abandoned and cancelled, and that from that time, to-wit, the said month of September, 1906, all attempted renewals of negotiations by said Swift or anybody representing him in connection with the proposed construction of said sugar-mill, have been refused, and that since the month of September, 1906, and prior thereto, they have been engaged separately and independently negotiating with other parties for the construction of a sugar-mill or central, to be known as the Central Eureka, for the purpose of grinding the sugar-canes to be raised in said vicinity by these defendants and neighboring sugar-planters."

And the final cancellation of all negotiations between appellants and the said Swift enterprise is directly found by

the court in the findings of fact at folio 86 of the transcript of the record, where the court says:

> "That on the 21st of September (1906) the said Cabasa, together with Clemente Javierre, one of the copartners of the respondent copartnership, sent a further cablegram to the said Swift in London, declaring that all negotiations with the said Swift were at an end and that they had found other parties who were able to make the required deposit or guarantee."

We therefore assume that there was no issue presented by the pleadings in the case as to the failure and abandonment of the Swift enterprise in the latter part of 1906, and we also assume and maintain, and make the same a part of our contention, that the judgment of the court is not in consonance with the findings of fact, in so far as the court finds that the said Swift enterprise had not been abandoned, and that, in fact, the said Swift was still negotiating and making efforts to secure contracts with planters during a portion of the year 1907.

We maintain that such findings on the part of the court find no warrant in the pleadings, and on the contrary are expressly excluded from any consideration by reason of the issues presented by the pleadings, and that, therefore, so far as such findings may be considered material in the support of the decision of the court, they are erroneous and must be rejected.

Starting then with the fact definitely alleged in both the complaint and answer, that the Swift enterprise was abandoned and was therefore eliminated from the situation in the latter part of the year 1906, we come to the meeting of planters held at the home of one of the appellants on October 20, 1906, at which the following agreement was executed by appellants, represented by Clemente Javierre and other planters (Transcript of Record, folios 86 and 87):

"Having met at Hacienda Dos Hermanos on the 20th of October, 1906, upon invitation from Don Antonio R. Cabasa y Tasara, to confer about the installation of Central Eureka, in view of the delay and it being almost sure that Mr. A. E. H. Swift, with whom Mr. Cabasa had a contract for installing said central, has not been able to accomplish it, a meeting was held by Messrs. Clemente Javierre, for Javierre and Gil, Mateo Fajardo, Luis Fajardo and Mr. Cabasa, who having heard the reasons set forth by Mr. Cabasa, all agreed as to the necessity of installing said central, and in order to accomplish such beneficial and necessary project they all agreed to carry same into effect, purchasing the establishments and the surrounding lands from Messrs. Fajardo for the erection thereon of said Central Eureka, under the following conditions:

"1. To organize a company for that purpose as soon as Messrs. Matias Gil and D. L. Thompson would arrive, they being absent.

"2. The corporation to be denominated 'Central Eureka' and the factory to be installed in the establishments of Messrs. Fajardo, hereinbefore mentioned, which shall be purchased at the price agreed upon by the incorporators.

"3. The incorporators bind themselves to sell their canes to this central during ten years, commencing from the one of 1908, as regards Javierre and Gil, Cabassa and Luis Fajardo, and after the expiration or cancellation of his contract with Guanica Central as to Mr. Mateo Fajardo.

"And for safety and record for all concerned a copy is issued to each of the interested parties who sign below.

(Signed) "CLEMENTE JAVIERRE.
"A. R. CABASA.
"M. FAJARDO.
"L. FAJARDO."

This meeting was followed by preparations, plans, and estimates for the proposed mill during November, 1906, which seems to have been all that was done prior to Decem-

ber 10 of that year, when the contract in controversy was executed.

The clause of said contract upon the meaning and intention, and construction of which this controversy rests, is that numbered XIV, as amended by the parties, and which reads as follows (Transcript of record, folio 17):

> "The duration of this contract will be five crops, beginning with that of 1906-1907, it being understood, however, that should the projected central 'Eureka' be constructed or in course of construction on the 15th of January, 1908 (1908), the party of the second part will have the right to cancel this contract, giving notice thereof to the party of the first part on October 1st, 1907, *Addition.* The party of the first part binds itself to place at Hormigueros station sufficient cars, on each working day, in order that the party of the second part may load about one hundred tons of cane daily, save cases of force majeur (fuerza mayor)."

It will be borne in mind that appellants at said time were under no obligation or promise of any kind to the said Swift enterprise.

The court distinctly finds, at folio 86, as hereinbefore set out, that the said appellants had, in September, cabled to London, severing all relations with the said Swift, so that from the pleadings and findings of fact the only obligation resting upon appellants at the time of the execution of the grinding contract of December 10, 1906, was that created by the agreement of the planters of October 20, aforesaid, by which they agreed to sell their canes to the new Eureka mill which they were proposing to themselves erect, and which, as shown by the record and findings of fact of the court, they did actually subsequently erect. (Transcript of record, folio 89.)

Much of the matter contained in the findings of fact relates to the alleged subsequent attempts on the part of Swift to continue or to reopen negotiations with various planters,

but as we contend that such findings of fact are directly in conflict with the pleadings, we maintain that they are entirely immaterial, and, in addition, there is no word or intimation in the findings which directly or indirectly connect appellants with any such alleged further negotiations, and it is expressly found by the court that appellants did not participate in the alleged meeting in connection with such efforts of said Swift, which is referred to in the fifteenth finding of fact in the record.

We are then, upon the pleadings and findings of fact presented, with the following situation on December 10, 1906. In making the contract it was specifically provided:

> "That should the projected Central 'Eureka' be constructed or in course of construction on the 15th day of January, 1908, the party of the second part shall have the right to cancel the present contract, giving notice thereof to the party of the first part on the 1st of October, 1907."

It is conceded that the Central Eureka, which was originated at the meeting of October 20, 1906, and in every step of which appellants participated, was either erected or in process of erection at the time indicated, and that the notice of cancellation, as required by said clause, was duly served. (Transcript of record, folio 97.)

We maintain that upon the record as presented and finding of facts a decree for the appellee, complainant below, was utterly inconsistent; that the decree is at variance with the facts as found by the court, and which must constitute the basis of its ultimate action.

The court does not pretend to find which Central Eureka was actually intended by the parties in making the contract of December 10, 1906, but the fact of a decree for complainant below, appellee here, necessarily assumes that the Swift project was the one referred to in the said grinding contract. This conclusion is not supported by the facts as declared by the court, but, on the contrary, we contend the only possible

logical conclusion from the statement of facts would be that the Central Eureka referred to was that in which appellants were at that time actually interested, and to which they had contracted on October 20, 1906, to furnish their sugar-canes for the period of ten years.

It has been consistently held that in case of such a variance between the findings and the decree that the court would reverse the judgment and render such judgment as would support the findings of the court below.

> "Deference to a chancellor's findings of fact will only be given on appeal on balanced or conflicting evidence, and when that appears to be correct."
>
> Glasgow Milling Co. *vs.* Burns, 144 Mo., 192.
> McElroy *vs.* Maxwell, 100 Mo., 308.
> Mandain *vs.* Fullenwider, 72 Neb., 221.

> "On appeal from an equitable action the judgment will be reversed if essential special findings are in conflict with a general finding, and the former are sufficiently supported by the evidence."
>
> Carpenter Paper Co. *vs.* The News Publishing Co., 63 Neb., 59.

> "Findings of fact must affirmatively support the judgment."
>
> Maynard *vs.* Locomotive Engineers Ins. Co., 14 Utah, 458.
> Karren *vs.* Karren, 25 Utah, 87.
> Kinsey *vs.* Green, 51 California, 379.

II.

THE COURT ERRED IN DECLARING THAT THE BURDEN OF SHOWING THAT THE CENTRAL EUREKA REFERRED TO IN PARAGRAPH XIV OF THE CONTRACT OF DECEMBER 10, 1906, WAS NOT THE PROJECT KNOWN AS THE SWIFT EUREKA CENTRAL WAS ON THE DEFENDANTS, AND THE COURT ERRED IN HOLDING THAT THE BURDEN OF PROOF AS TO THE IDENTITY OF THE PROJECTED CENTRAL EUREKA REFERRED TO IN SAID AMENDED PARAGRAPH XIV OF THE GRINDING CONTRACT OF DECEMBER 10, 1906, WAS ON THE DEFENDANTS.

This will cover several of the assignments of error which may be grouped and discussed together, as they constitute really a single branch of the controversy.

The court below in its opinion and findings expressly placed the burden of proof as to the identity of the projected Central Eureka referred to in paragraph XIV of the grinding contract, as amended, upon the defendants.

In the last paragraph of the opinion of the court (Transcript of record, folio 65) it is said:

> "As stated, we feel that the burden is on the respondents as to the real issue in the case, and we find that they have not by a preponderance of the evidence established their right to have given this notice to complainant on October 1, 1907, and to end the contract."

Also, the same ruling is made at folio 50 of the opinion of the court, and in the findings of fact numbered 9 and 13, at folios 96 and 98 of the record, the court emphasized this ruling in the following language:

> "The court further finds from the evidence that the respondent copartnership has not proven by a preponderance of the evidence that the projected Eureka Central mentioned in clause XIV, as amended, of the contract of December 10, 1906, re-

ferred to the projected enterprise which was initiated at the alleged meeting on October 20, 1906, of the said sugar-cane planters, and the said respondent co-partnership has not shown by a preponderance of the evidence that the projected Central Eureka mentioned in the said paragraph XIV of said contract of December 10, 1906, was not the project known as the Swift Eureka, in which enterprise the said respondents had been interested, as hereinbefore determined.

* * * * * * *

"And the court finds that the alleged proposal to erect a Central Eureka by the said planters, including the said respondents Javierre & Gil, was not generally known at said time; that the burden of proof in this cause as to the identity of the projected Central Eureka referred to in the said amended paragraph XIV, of said contract of December 10, 1906, was on the respondents, and that the said respondents did not maintain or prove by a preponderance of the testimony that the said projected Central Eureka referred to in the said clause of said contract was not the said projected central of Swift, or that the same was the projected central which has since been erected by the said planters, including the said respondents, under the said name of Eureka."

And the failure of defendants to produce such preponderance of the evidence is directly stated by the court to be the controlling reason for the decision in favor of appellee.

A brief analysis of the situation presented by the pleadings would seem to clearly demonstrate the absolute error of the court in this ruling.

This is a suit for an injunction, seeking to prevent defendants from carrying out a threatened violation of a contract.

In the bill of complaint the contract is set forth and declared upon, and it is alleged that the proposed Eureka Central referred to in clause XIV of the contract is the said Swift enterprise and no other. It is also charged in paragraph XII of the bill of complaint (folios 7 and 8, Tran-

script of record) that the defendants, appellants, entered into a conspiracy and combination with certain other people therein named to create a new Central Eureka for the sole and only purpose of enabling appellants to claim that the same was the identical Central Eureka referred to in said paragraph XIV, and to thus enable them to fraudulently and wrongfully rescind the contract of December 10, 1906, and the charge of fraudulent combination and conspiracy constitutes the basis of the prayer for relief.

It must be borne in mind that this bill of complaint was filed more than three months prior to the time (October 1, 1907) when appellants could, under the contract, take any steps or give any notice of their election to cancel the contract under the provisions of said paragraph XIV.

The answer fully denies all allegations of fraudulent combination or conspiracy, and denies with equal positiveness that the Central Eureka, referred to in the said paragraph XIV of the contract, was the so-called Swift Eureka Central, but alleges that the central so referred to was that having its origin in the meeting on October 20, 1906, and in which defendants (appellants) were participants and large stockholders.

We inquire, was there, or is there now, any presumption that the Central Eureka referred to was the Swift project any more than that it referred to the Fajardo project of October 20, 1906?

A decision of the court to the effect that appellants must show by a preponderance of the evidence that the Swift project was not the proposed Central Eureka referred to, or, as stated by the court at another point, that appellants must show by a preponderance of the evidence that the Eureka Central referred to in said contract was the project in which they were interested, would indeed provide a new rule of evidence and one which our search of the authorities has not yet disclosed, either in text-book or decision.

The universal rule that the burden of proof of a fact is

upon him who asserts it is sufficient of itself to cover the necessities of this case.

Complainants allege, and to recover must prove, that defendants entered into a combination or conspiracy to enable them to violate a contract; that this violation was to be committed by pretending that a certain proposed sugar-mill known by the name of "Eureka" was not, in fact, the Eureka project which the complainants alleged it to be, and, in order to make proof to justify a decree in favor of complainant, it must prove by a preponderance of the testimony, in view of defendants' denial, that the [illegible]ft Eureka was the project actually intended and referred to in the said contract.

> "He who avers a fact as a cause of action or defense must maintain his allegation by the greater weight of the evidence."
>
> Mutual Reserve Fund Life Assurance Co. *vs.* Powell, 79 Ill. Appeals, 364.
>
> Piper *vs.* Watkins, 8 Kansas Appeals, 215.

> "The burden of sustaining the affirmative of an issue does not shift during the progress of a trial, but it is for the party alleging the facts constituting the issue, and remains there until the end."
>
> Rupp *vs.* Sarpy County, 71 Neb., 382.
> Vertrees *vs.* Gage County, 75 Neb., 332.
> Simmonton *vs.* Winter, 5 Peters, 141.
> Adams *vs.* Adams, 21 Wallace, 185.
> Knox *vs.* Smith, 4 Howard, 298.
> Lewis *vs.* Cocks, 23 Wallace, 470.

And there is no rule better established than that which declares that fraud and conspiracy, when alleged as the basis of an action, must be clearly proven in order to warrant a recovery.

Farrar *vs.* Churchill, 135 U. S., 609.
Gaines *vs.* Nicholson, 9 Howard, 356.
United States *vs.* Da Maza Arredondo, 6 Peters, 691.
Jones *vs.* Simpson, 116 U. S., 609.
Jacobs *vs.* Van Sickel, 123 Fed., 341.

The learned judge below, in his opinion, in attempting to justify his ruling placing the burden of proof in this case on the defendants, and as set forth at folio 50 of the transcript of the record, cites several cases, assuming to find a similarity between the facts in the present case and those upon which the cases so cited were founded, and wherein it had been held that the burden of proof in those actions devolved upon the defendants; but we maintain that an examination of these authorities clearly shows that they are far from being in support of the position for which the learned judge was contending, but rather that they favor the contention which we now present. Certainly in no one of the cases cited by the court below were the facts either analogous or in anywise based upon a situation similar to the one presented in this present controversy.

The decision in the case of Cheesman *vs.* Hart, 42 Fed., 105, quoted by the court as supporting said ruling, is an announcement of the doctrine maintained by all of the Federal courts, in the so-called apex and side-line controversies in the mining laws, and under which it has been universally held that the burden belongs upon the defendant, and, under the circumstances as disclosed by the issue in those cases, there would seem to be no contention as to the correctness of that ruling; but the situation thus presented is so utterly foreign to that presented in the present controversy as to make them entirely valueless as authorities in this controversy.

It might be interesting, however, in this same connection to invite the attention of the court to the fact that in the opinion of Judge Phillips, in the case reported in the 42d Federal, just referred to, and relied upon by the learned judge below in support of his decision of this point, that Judge Phillips emphatically determined that, inasmuch as the burden of proof devolved upon the defendants in that case, that the defendants should have the opening and close in the controversy, and we remark, in passing, and the record will bear us out, that it never was pretended or assumed

that in this controversy the defendants were entitled to the opening and closing, or to any advantage in connection with the trial which might result from the fact of the burden of proof being shifted upon them.

III.

THE ERROR OF THE COURT IN HOLDING THAT THIS CASE PRESENTED, IN ANY EVENT, ANY GROUND FOR EQUITABLE RELIEF, AND IN THE ISSUANCE OF AN INJUNCTION IN THE PREMISES. THE ONLY CONSISTENT RELIEF WHICH COULD BE APPLIED FOR WOULD BE IN THE NATURE OF SPECIFIC PERFORMANCE.

In presenting this assignment of error, we maintain that the bill of complaint in this action did not present any recognized ground for equitable relief.

It was conceded on the trial that, under the circumstances disclosed by the bill of complaint, specific performance would not lie.

A similar case was that of Grape Creek Coal Company *vs.* Spellman, 39 Ill. Appeals, where the court decided:

> "Chancery will not entertain a bill to specifically enforce a contract to sell to complainant all of the output of defendant's coal mine, it being a contract relating to personal property and calling for a succession of acts whose performance cannot be consummated by one transaction, and which requires protracted supervision and direction."

As stated, and the record shows, the court did find that specific performance would not lie, but upheld the contention of complainant's counsel that the negative remedy of injunction to prevent a breach of contract could be made effective. This negative remedy by injunction to prevent a breach of contract, though one of the well-established forms of equitable relief, is only granted in certain well-defined classes

of cases, to which this suit is in no way analogous, and it can only be invoked when the facts stated from their nature show that specific performance would be impracticable.

In the argument in the court below, counsel for appellee urged that the case would fall within the purview of those decisions well known and fully conceded in which courts have declined to render a decree for the performance of contracts involving personal services, such as the performing of musicians, the acting of actors, or other cases in which, owing to their peculiar characteristics, the enforcement of performance would be practically impossible, and in this contention the court below coincided. (Transcript of record, folio 48.) But in no way do either the principle or reasoning of those cases enter into the facts stated herein. Here is a plain and simple contract, that for a prescribed period of time appellants will deliver to appellee all sugar-canes which they may raise upon certain premises therein described. If they should abandon the raising of any sugar-cane during said time they are at entire liberty to do so and no damages could be claimed against them; but, if they do raise any cane on said premises during said time, it must be sold and delivered to appellants under said contract. Under such circumstances it is hard to conceive how it would be possible for equity to intervene to grant any form of relief. The granting of an injunction, as was done in this case, to prevent the defendants from selling their sugar-canes to some other sugar-mill could in nowise benefit the complainant. If it could not have the benefit of a decree for specific performance, and thus avoid the irreparable injury threatened, which must form the basis of this action, what possible good would be a decree prohibiting the sale of such sugar-canes to any other mill? And why should equity intervene? Why would not an action at law for damages be equally, or even more, effective for complainant? And, in this connection, we invite the attention of the court to the fact that there was not in the complaint any allegation of insolvency on the part of defendant.

IV.

THE COURT ERRED IN GRANTING ANY RELIEF TO APPELLEE, BECAUSE THE CONTRACT WAS WHOLLY UNILATERAL AND INCAPABLE OF ENFORCEMENT BY A COURT OF EQUITY, EITHER BY WAY OF SPECIFIC PERFORMANCE OR BY INJUNCTION.

This assignment involves an investigation of the contract of December 10, 1906, which is set forth at folios 13 to 17 of the transcript of the record.

We have here presented in seventeen paragraphs the printed form which, according to the transcript of the record in this case, was regularly used by this sugar company for its business and which the planter is called upon to execute in order to find a sale for the product of his labor, and we invite the attention of the court to a brief review of its provisions with the object of ascertaining whether it is sufficiently mutual in its provisions or requirements as to justify the intervention of a court of equity in decreeing either its enforcement or in granting any relief as against a planter who refuses to abide by its harsh provisions.

By the provisions of paragraph I it is provided that the canes to be raised on certain premises shall be ground at the factory of appellee.

By paragraph II the condition of the cane and the manner of cutting and delivery are provided for.

By paragraph III the manner of payment of expenses of cutting and delivery are provided for.

By paragraph IV the manner of weighing the cane is fixed.

By paragraph V the condition of the cane and time to commence cutting is fixed, and it is put at the discretion of the mill.

By paragraph VI a penalty is provided in favor of the mill in case the planter should violate certain of its provisions.

By paragraph VII the grinding season is fixed.

By paragraph VIII the planter must notify the mill how much cane he will deliver during any month of the crop.

By paragraph IX the price to be paid for the cane is fixed.

By paragraph X the time for making payment for canes delivered is fixed.

By paragraph XI it is provided that in any case of breakage of machinery, or mill, or railroad, cutting and delivery of cane shall immediately stop, on notice, and that after a certain time the planter may sell his cane to some other mill until such time as such breakage shall be repaired, when delivery under the contract shall be at once resumed.

By paragraph XII it is provided that, in case of fire in the field, the burned cane shall be first ground, but at prices to be agreed upon.

By paragraph XIII it is provided that if the canes delivered are not up to a degree of sugar prescribed the mill may refuse to receive them.

By paragraph XIV the duration of the contract is fixed, and it will be noticed, in this connection, that under this section the mill is given an option to extend the terms of the contract for five years without corresponding option upon the part of the planter.

By paragraph XV the planter is prohibited from selling, donating, renting, leasing, or mortgaging his property, or establishing any lien or encumbrance on it or its products during the life of the contract, except on condition that the contract shall be fully respected, and under this same paragraph the mill is authorized to sell, assign, or transfer the contract in its discretion.

Paragraph XVI is a palpable joke; it provides that if any money shall be loaned by the mill to the planter a special contract, in a separate document, shall be made for it.

Paragraph XVII provides that the mill may station a man at the loading station to determine that the canes offered for shipping are satisfactory to the mill.

This is the contract, and it might be pertinent to inquire

where are the paragraphs which provide anything for the protection of the planter or his rights?

It certainly is one of the most unjust and unilateral contracts ever presented to a court for consideration.

The only possible theory that we can conceive upon which a court, either of equity or law, would be justified in attempting either to hold a planter to the performance of such a contract, or to award damages for its violation, would be in a case where, in order to justify the construction of a mill and the expenditure of the money necessary therefor, it would be necessary that contracts for periods of time should be made with planters; but that element of reasoning cannot possibly enter into this case, because, as clearly appears from the record in this case, the mill of appellee was constructed and in full operation during the grinding season of 1905, and the investments in connection therewith were in nowise dependent upon nor had any relation to the grinding contract with appellants executed in December, 1906, and for canes growing, as shown by the record, at least ten miles from the location of the mill. (Transcript of record, folio 2.)

It cannot be contended that appellee's mill was either constructed or enlarged upon any consideration moving from this contract. Therefore we come again to the matter of the contract itself to ascertain whether it contains such mutual and enforceable provisions as will bring it within the protection of the benevolence of a court of equity, or whether it is a simple promise, having no real consideration, and therefore subject to be ignored by either party.

If it may be enforced against the unfortunate planter, then, under all rules and principles of equity, it must be enforceable against the mill; but it is apparent that this is not so. Under this contract the mill can so arrange its affairs as to dictate when, where, and how it will receive the canes, and their condition; it can effectively terminate the contract, if it shall see fit to do so, or may, on its own motion, arbitrarily extend it for five years. The price it pays may

be a good one for one year and a bad one for the next, and nowhere throughout the entire contract does there appear to be any consideration for the planter for thus burdening his future and his property.

It cannot be urged that appellants were in anywise dependent upon appellee for a market for their sugar-canes, for they were dealing with other mills before appellee's factory was started, and the bill of complaint shows that there are more mills in the vicinity than the supply of sugar-cane would justify.

"The remedy must be mutual."
Ross *vs.* U. P. R. R. Co., Fed. Cases, 12080.
Pullman Par. Car Co. *vs.* Texas & Pac. R. R. Co., 11 Fed., 625.

"Where a contract is harsh the court will leave the parties to their remedy at law."
King *vs.* Hamilton, 29 U. S., 311.
Redman *vs.* Zilley, 1 N. J. Equity, 320.
Appeal of Weise, 72 Pa., 351.

"Even though the contract be valid at law, if it be harsh or unjust, equity will not relieve."
Leigh *vs.* Crump, 36 N. C., 299.
Freind *vs.* Lamb, 152 Pa., 529.

Upon the whole of the record and proceedings in this case counsel for appellants thereupon respectfully submit these their contentions, and pray for the reversal and setting aside of the judgment and decree of the court below.

Respectfully submitted,

CHARLES HARTZELL and
M. RODRIGUEZ SERRA,
Solicitors for Appellants.